SUPREME COURT, U. S.
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MICHAEL RODAK, JR.,

Supreme Court of the United States

October Term, 1974
No. 74-936

EDWARD C. VOLL,
Petitioner,

vs.

DENNIS SHAUL, DIRECTOR OF COMMERCE,
DIVISION OF LICENSING,
STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Eighth Appellate District of Ohio

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OPINIONS BELOW

The adjudication Order of the Ohio Department of Commerce, Licensing Division, is printed in the Appendix herein, *infra.*

The Judgment and Opinion of the Cuyahoga County Court of Common Pleas is printed in the Appendix herein.

The Judgment and Opinion of the Court of Appeals for Cuyahoga County is not officially reported and is printed in the Appendix herein.

The judgment of the Supreme Court of Ohio dismissing the appeal is printed in the Appendix herein.

The judgment of the Supreme Court of Ohio overruling the motion to certify is printed in the Appendix herein.

The order of the Supreme Court of Ohio denying rehearing is printed in the Appendix herein.

JURISDICTION

The Order of the Supreme Court of Ohio denying petitioner's motion for Rehearing was made and entered on November 1, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the Federal Constitutional "Due Process Clause" of the XIV Amendment Section 1 guarantee to a state license holder a fair hearing before an impartial and unbiased tribunal where a state agency orders an adversary adjudication hearing?

2. Does the Federal Constitutional "Due Process Clause" of the XIV Amendment Section 1 prohibit a state of the United States from punishing a state license holder twice for the same offense where the State Constitution prohibits double jeopardy?

CONSTITUTIONS AND STATUTES

The relevant constitutional and statutory provisions are set forth in the Appendix hereto, as follows:

Constitution of the United States, Amend. XIV, Sec. 1;

Constitution of Ohio, Art. I, Sec. 10; and

Ohio Revised Code, Secs. 119.09, 119.01(C) and 119.02.

STATEMENT OF THE CASE

Mr. Edward C. Voll, state license holder and petitioner herein appeared at two state adjudication hearings before the Division of Licensing, Department of Commerce, State of Ohio, as ordered by said agency concerning license holder having violated O.R.C. 4749.04 (B) which provides that the director may *revoke, suspend, or refuse* to renew the license of any private investigator upon the conviction of a felony. Dennis Shaul, Department of Commerce, Division of Licensing, selected and appointed one hearing officer pursuant to O.R.C. 119.09 to hear said case. The license holder stipulated at said hearing his guilty plea to a felony in Federal District Court but he presented extensive testimony and exhibits in mitigation of penalty. The Director of Commerce who was represented at said two hearings by the Attorney General of Ohio through an assistant Attorney General offered no evidence whatsoever. After weighing all the evidence the hearing officer pursuant to O.R.C. 119.09 made a finding of fact, conclusion of law and recommended that the penalty in the case be a conditional license probation for three (3) years. The Director of Commerce, Dennis Shaul, who was not present at any of the hearings, heard no evidence whatsoever, and offered none, refused to accept the penalty recommendation of his hearing officer and on his own motion ordered his own personal penalty into operation; to wit:

. . . "To date, the present Director of Commerce has never permitted a felon to continue as or to become a license holder" . . .

"It is hereby ordered that the private investigator's license held by Edward C. Voll is revoked" . . .

Petitioner, Mr. Voll, appealed said adjudication order to the Court of Common Pleas of Cuyahoga County, Ohio, who ruled as follows:

"Decision of Director is modified. O.S.J."

"Oral hearing had and after review of all the evidence and the law the Court finds that the order revoking appellant's license be reversed as being unduly extreme and harsh; that the judgment be modified to a suspension for a period of sixty days commencing January 1, 1974 and ending March 1, 1974, at which time appellant's license will be automatically reinstated."

The license holder was forced and did comply with said 60 day license suspension as ordered. He was punished.

The Director did not request or obtain a stay of said 60 day license suspension as ordered but acquiesced in same at the time.

However, subsequently, the Director appealed said license suspension order to the State District Court of Appeals who held:

. . . "We therefore sustain appellant's assignment of error and reverse the judgment of the Common Pleas Court. As it is our conclusion that the order of the agency was in fact supported by the required quantum of evidence, pursuant to Appellate Rule 12 (B) we

therefore, enter final judgment for appellant, Dennis Shaul, Director, Department of Commerce" . . .

The license holder timely motioned the Court of Appeals for a reconsideration of its tentative judgment because same would deny to Petitioner his Federal Constitutional Guarantee of "Due Process of Law" and inflict double punishment. The Court overruled said motion.

The Petitioner then appealed said judgment of the Court of Appeals to the Supreme Court of Ohio who dismissed the appeal and refused to review said case. On November 1, 1974 Petitioner's timely filed motion for reconsideration was denied by said Court.

REASONS FOR ALLOWING THE WRIT

The State of Ohio has violated petitioner's Federal Constitutional Guarantee of "Due Process of Law" as guaranteed to him by the XIV Amendment, Section 1; to wit:

1. Petitioner was denied (by State Statute, O.R.C. 119.09) a fair adjudication hearing before an impartial and unbiased tribunal;

2. Petitioner has been twice punished for the same offense contrary to the prohibition contained in the Constitution of the State of Ohio, Article I, Section 10.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

O.R.C. 119.09 mandates that: ". . . In any adjudication hearing required by Section 119.01 to 119.13 inclusive, of the Revised Code (Administrative Procedure Act) the Agency may appoint a referee or examiner to conduct

said hearing. . ." "Such referee or examiner shall have been admitted to the practice of law in the State and be possessed of such additional qualifications as the Agency requires. . ." ". . . A stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. . . Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing"...

I. No Fair and Impartial Hearing

Since the state agency is legally required by law to investigate, prosecute, hear, and punish transgressors how then can one have a fair and impartial hearing before a hearing officer that is selected, appointed and controlled by said agency pursuant to O.R.C. Section 119.09?

O.R.C. Section 119.09, in said particular, is repugnant to the "Due Process Clause" of the XIV Amendment to the Federal Constitution because the rule of law is that the officer who presides at a hearing or who examines the facts and makes or prepares the decision must not be biased or prejudiced and if there is a two-party procedure in the nature of a litigation then the one who decides must be physically different from either party's representative; to-wit:

Narragansett Racing Assn. v. Kiernan, 194 A. 692 (Rhode Island 1937); Note, 41 COL. L. REV. 1384 (1941);

National Labor Relations Board v. Donnelly Garment Co., 67 S. Ct. 756 (1947);

Davis, *Separation of Functions in Administrative Agencies,* 61 HARVARD L. REV. 389 (1948).

Petitioner, Edward C. Voll, at said two adjudication hearings, presented extensive evidence in mitigation of

penalty by way of testimony and exhibits, which were for the consideration of the hearing officer. Dennis Shaul offered no evidence whatsoever, heard no evidence, and imposed his own personal arbitrary opinion and punishment, to wit:

> . . . "the present Director of Commerce has never permitted a felon to continue as or to become a license-holder" . . .
>
> "It is hereby ordered that the private investigator's license held by Edward C. Voll is revoked". . .

Said opinion certainly demonstrates the bias of the director towards felons and in particular this petitioner. Said hearing was a sham.

II. Void Punishment

Also said punishment should be void because the general penalty as executed by Dennis Shaul against felons and in particular petitioner was not adopted by the agency according to state law; was not published; is not of record, and by state law is void; to wit:

O.R.C. 119.01 (C):

> " 'Rule' means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights."

O.R.C. 119.02 Compliance; validity of rules.

> "Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure pre-

scribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the *failure of any agency to comply* with such procedure *shall invalidate any rule* or amendment adopted, or the rescission of any rule."

III. Double Punishment

The Court of Common Pleas on appeal in this case ordered a 60 day "License Suspension" as the penalty and petitioner was forced by Court order to pay said penalty in full and was punished for his offense.

Now when the Court of Appeals reversed the Common Pleas Court judgment and ordered the reinstatement of the Adjudication Order a second punishment for the same offense was ordered against petitioner by the State—"License Revocation."

Question

What rule of law protects petitioner from double punishment by the State in this case if it is not the rule of "Double Jeopardy?"

The Ohio State Constitution Article I, Section 10, mandates ". . . No person shall be twice put in jeopardy for the same offense. . ."

The case law of Ohio holds that:

> "The constitutional right of former jeopardy prohibits a second punishment for the same offense."
>
> *State v. Preston*, 20 Ohio App. 2d 333, 49 Ohio Op. 2d 456, 253 N.E.2d 827.

Petitioner has by state statute, O.R.C. 119.09 (and otherwise), been denied a fair and unbiased administrative

hearing. Further the administrative punishment as ordered in this case is arbitrary and void. Also petitioner was once punished for his offense by the State. Now the State of Ohio has ordered a second punishment for the same offense.

Petitioner has been denied by the State of Ohio "Due Process of Law" same being guaranteed to petitioner by the Federal Constitution Article XIV Section I.

Petitioner respectfully moves that his petition for Writ of Certiorari be granted.

GORDON T. CANNING, JR.
Attorney for Petitioner

APPENDIX

ORDER OF THE OHIO DEPARTMENT OF COMMERCE

(Dated October 12, 1973)

STATE OF OHIO
Department of Commerce
Office of the Director
Columbus, Ohio 43215

In the Matter of:
Edward C. Voll
10535 Carnegie Avenue
Cleveland, Ohio 44106

ADJUDICATION ORDER

This matter concerns the suitability of Edward C. Voll to remain licensed as a private investigator under sections 4749.01-.99, O.R.C. It was proposed by the Division of Licensing of the Department of Commerce that Mr. Voll's license be revoked, suspended, or not renewed, pursuant to § 4749.04, O.R.C. The matter was heard before Anthony R. Zingarelli, Hearing Officer, on May 11, 1973 and September 5, 1973 at the Division of Licensing, 361 E. Broad St., Columbus.

It was stipulated by Mr. Voll that on April 6, 1973, in the United States District Court for the Northern District of Ohio, he was convicted of the felony of illegal interception of wire communications, in violation of 18 U.S.C.A. § 2511. It was further stipulated by Mr. Voll that the Director of Commerce possesses discretionary power under § 4749.04 (B), O.R.C., to revoke, suspend, or refuse to renew Mr. Voll's license.

It was the recommendation of the Hearing Officer that "Edward C. Voll be placed on conditional probation for a period of three (3) years." That recommendation is disapproved, pursuant to § 119.09, O.R.C.

Neither the statutes nor the rules applicable to private investigators provide for a licensee to be in a status of probation or of "conditional probation." The Director of Commerce lacks authority to follow the recommendation of the Hearing Officer.

In exercising discretion concerning licenseholders who are convicted of felonies, it has been the practice of the present Director of Commerce, and apparently of his predecessors, to impose a very heavy presumption against continued holding of the license. To date, the present Director of Commerce has never permitted a felon to continue as or to become a licenseholder.

In particular, where the offense occurs in the course of the licenseholder's business, there is special cause for concern. Mr. Voll's offense is particularly reprehensible, coming as it did from one licensed by the state to probe the private lives of others.

The privilege of conducting such probes must be controlled with the utmost care. To do otherwise would place the most precious constitutional protections in jeopardy. As the person in whom responsibility for licensing this privilege has been vested, the Director of Commerce must insure that his decisions contribute to maintaining the highest possible ethical standards among investigators.

In the opinion of the Director, to permit Mr. Voll to continue in business as an investigator would invite a slackening of the ethics of the profession. The temptation to use wiretapping and related techniques is very

great for investigators and must be especially and specifically discouraged.

Mr. Voll has offered considerable evidence of the good opinion held of him by respected officials in his community. But those holding licenses must understand that the use of wiretapping techniques is intolerable, and that even the most respected among them will be severely disciplined for violations of the wiretapping laws.

It is hereby ordered that the private investigator license held by Edward C. Voll is revoked.

Appeal from this order may be had, pursuant to § 119.12, O.R.C., in the common pleas court of the county in which Mr. Voll's place of business is located, or of the county of which Mr. Voll is a resident.

/s/ Dennis Shaul
Director of Commerce
October 12, 1973

DECISION OF THE COURT OF COMMON PLEAS

(Filed December 21, 1973)

No. 432404

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

In the Matter of:
EDWARD C. VOLL,
Plaintiff,

vs.

DENNIS SHAUL,
Director of Commerce, State of Ohio,
Defendant.

JOURNAL ENTRY

Oral hearing had and after review of all the evidence and the law the Court finds that the order revoking appellant's license be reversed as being unduly extreme and harsh; that the judgment be modified to a suspension for a period of sixty days commencing January 1, 1974 and ending March 1, 1974, at which time appellant's license will be automatically reinstated.

Costs assessed against the appellant.

/s/ CARLOS M. RIECKER,
Judge
(Sitting by Assignment from
Morgan County)

DECISION OF THE COURT OF APPEALS

(Filed May 30, 1974)

No. 33365

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

EDWARD C. VOLL,
Appellee,

vs.

DENNIS SHAUL, DIRECTOR OF COMMERCE,
STATE OF OHIO,
Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Edward C. Voll, appellee herein, was licensed as a private investigator under R.C. 4749.01 et seq. when he, with the assistance of counsel, entered a plea of guilty and was convicted under an indictment for the offense of having unlawfully endeavored to intercept wire communications and having procured another person to intercept wire communications, in violation of Title 18, Section

2511(1)(a),* United States Code, in Federal District Court on April 6, 1973.

On May 11, 1973, and September 5, 1973, Mr. Voll appeared at hearings before the Division of Licensing, Department of Commerce, appellant herein, to answer questions concerning Mr. Voll's having violated R.C. 4749.04(B) as he had been convicted of a felony. R.C. 4749.04 provides in pertinent part as follows:

> The grounds for which the director of commerce may revoke, suspend, or refuse to renew the license of any private investigator or the registration of any employee includes any of the following:
>
> * * * * *
>
> (B) Conviction of a felony or a crime involving moral turpitude;
>
> * * * * *
>
> Any person whose license or registration is revoked, suspended, or not renewed may appeal in accordance with Chapter 119. of the Revised Code.

After the conclusion of these hearings, Dennis Shaul, Director of Commerce, issued an adjudication order on October 12, 1973, revoking Mr. Voll's private investigator's license for a violation of R.C. 4749.04(B). Mr. Voll appealed this adjudication to the Common Pleas Court, which court on December 21, 1973, journalized the following entry:

> "Decision of Director is modified. O.S.J."
>
> "Oral hearing had and after review of all the evidence and the law *the Court finds that the order*

---

*One who violates 18 U.S.C. 2511(1)(a) can be fined up to $10,000, imprisoned up to five years, or both.

revoking appellant's license be reversed as being unduly extreme and harsh; that the judgment be modified to a suspension for a period of sixty days commencing January 1, 1974 and ending March 1, 1974, at which time appellant's license will be automatically reinstated.

"Costs assessed against the appellant." (Emphasis added.)

The Director of Commerce has appealed from the judgment of the court below assigning as error that:

In an appeal prosecuted under R.C. 119.12, the court, having found reliable, probative, and substantial evidence to support the findings of the Director of Commerce, is without authority to modify the penalty imposed by the Director.

Section 119.12 of the Revised Code has consistently been interpreted to hold that a reviewing court is without jurisdiction and authority to vacate, reverse, or modify an administrative agency's order unless it first finds that such order is not supported by reliable, probative, and substantial evidence. *See Department of Liquor Control v. Santucci* (1969), 17 Ohio St. 2d 69, 70-71; *Henry's Cafe Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233, 236. Furthermore, no jurisdiction exists in Common Pleas Court to modify an order on the ground of abuse of discretion by the agency. *See Henry's Cafe, supra* at 237.

In the present case it is an undisputed fact in the record that appellee-licensee was convicted of a felony in Federal District Court, which constitutes a violation of R.C. 4749.04(B), and there is no question that the fact of this conviction and the corresponding Code violation were supported in the record by reliable, probative, and substantial evidence before the Division of Licensing.

Upon judicial review pursuant to R.C. 119.12, however, the court made no finding that the agency's adjudication was not supported by the required quantum of evidence but nevertheless proceeded to modify and mitigate the penalty imposed by the agency on that clear evidence simply on the basis that such penalty was "unduly extreme and harsh." Significantly the lower court made no explicit finding that the agency's order was not supported by the evidence but merely modified the penalty and then assessed costs against Mr. Voll. It is inconsistent that the lower court would both make a finding in effect that Mr. Voll had prevailed in establishing that the fact of his violation of R.C. 4749.04 was unsupported by the evidence and then assess the costs of the action against him. Therefore, the only reasonable conclusion is that the lower court did *not* find that the agency's order was unsupported by the evidence but simply modified the penalty.

A long line of authority holds that a reviewing court pursuant to R.C. 119.12 cannot modify the penalty imposed under an agency order unless it first finds that such order is not supported by reliable, probative, and substantial evidence. *See Evans v. Board of Liquor Control* (1960), 112 Ohio App. 264; *Buckeye Lake Hotel Co. v. Board of Liquor Control* (1958), 108 Ohio App. 417; *Carpenter et al., State Board of Real Estate Examiners v. Sinclair* (1958), 106 Ohio App. 211. *Cf. In re Revocation of License: Jenkins v. Board of Real Estate Examiners* (1958), 106 Ohio App. 391, 392.

In the present case the fact of the felony conviction is undisputed and as a violation of R.C. 4749.04 was clearly supported by reliable, probative, and substantial evidence before the Division of Licensing. Mr. Voll had ample opportunity and did in fact present whatever evidence in mitigation of that clear violation in his testimony at

the administrative hearings. The penalty imposed by Director Shaul was provided for and in accordance with the statute. Absent a finding that the order was not supported by the evidence, the lower court's substituting its judgment for that of the Director as to what constitutes a fair penalty was contrary to law and reversible error.

We therefore sustain appellant's assignment of error and reverse the judgment of the Common Pleas Court. As it is our conclusion that the order of the agency was in fact supported by the required quantum of evidence, pursuant to Appellate Rule 12(B) we therefore enter final judgment for appellant, Dennis Shaul, Director, Department of Commerce.

Judgment reversed.

No other error appearing in the record, judgment of the Common Pleas Court is reversed and order of the Director of Commerce revoking the license is reinstated.

It is therefore considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JOSEPH H. SILBERT
Presiding Judge

SILBERT, C. J., CORRIGAN, J.,
MANOS, J. Concur.

JUDGMENT ENTRIES OF OHIO SUPREME COURT

(October 10, 1974)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

EDWARD C. VOLL,
Appellant,

vs.

DENNIS SHAUL,
Dir. of Commerce, Div. of Licensing,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

* * * * *

(Caption as above)

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER DENYING REHEARING

(November 1, 1974)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

EDWARD C. VOLL,
Appellant,

vs.

DENNIS SHAUL,
Dir. of Commerce, Div. of Licensing,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

CONSTITUTIONAL PROVISIONS INVOLVED

Federal Constitutional Provision

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio State Constitutional Provision

Art. I, § 10:

. . . No person shall be twice put in jeopardy for the same offense.

OHIO STATUTES INVOLVED

O.R.C. § 119.09 Adjudication hearing.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas,

and for that purpose the agency may, and upon the request of any party receiving notice of said hearing as required by section 119.07 of the Revised Code, shall, issue a subpoena for any witness or a subpoena dueces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every

adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13, inclusive, of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party, otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a party of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and authority in conducting said hearing as granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth

his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by registered mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by registered mail, return receipt requested, upon the party affected thereby, a certified copy of the

order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

O.R.C. 119.01 (C)

"Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights."

O.R.C. § 119.02 Compliance; validity of rules.

Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.

LIBRARY
SUPREME COURT, U. S.

FEB 24 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-936

EDWARD C. VOLL,

Petitioner,

vs.

DENNIS SHAUL, DIRECTOR OF COMMERCE, DIVISION OF LICENSING, STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT OF OHIO

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-936

EDWARD C. VOLL,

Petitioner,

vs.

DENNIS SHAUL, DIRECTOR OF COMMERCE, DIVISION OF LICENSING, STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT OF OHIO

STATEMENT OF THE CASE

The Petitioner herein has at all times pertinent hereto been licensed, pursuant to Chapter 4749., Ohio Revised Code, as a private investigator by the State of Ohio through the Division of Licensing of the Department of Commerce.

On April 6, 1973, in The United States District Court for the Northern District of Ohio, the Petitioner, with the assistance of counsel, entered a plea of guilty and was convicted under an indictment for the commission of a felony, to wit: a violation of Title 18, Section 2511 (1) (a), United States Code, for having unlawfully endeavored to intercept wire communications and having procured another person to intercept wire communica-

tions. Pursuant to Section 4749.04 (B), Ohio Revised Code, the license of a private investigator may be revoked in accordance with Ohio's Administrative Procedures Act, *i.e.*, Chapter 119., Ohio Revised Code, upon conviction of a felony. In accordance with these procedures the Petitioner was given the required notice of opportunity for hearing regarding the matter of his suitability to remain licensed as a private investigator. Said matter came on for hearing on May 11, 1973. Prior to the conclusion of said hearing it was continued until September 5, 1973, whereupon said hearing was completed. During these hearings counsel for both Petitioner and Respondent stipulated, *inter alia*, that the Petitioner had in fact been convicted of the abovementioned offense; that such offense constituted a felony; and, that the Respondent had both grounds and the authority to revoke, suspend or refuse to renew Petitioner's license.

The aforementioned adjudication hearing was conducted in accordance with Section 119.09, Ohio Revised Code, and the Respondent herein did appoint, pursuant to this statute, a hearing officer to conduct said hearing. Subsequent to said hearing, the hearing officer submitted his report as described in Petitioner's Statement of the Case. Pursuant to Section 119.09, Ohio Revised Code, the hearing officer's report is to contain his Findings Of Fact, Conclusions of Law and a recommendation as to the action to be taken by the agency. Thereafter, pursuant to this statute the Respondent had a duty to approve, modify or disapprove the recommendations made by the hearing officer. In the instant action, the Respondent issued his Adjudication Order on October 12, 1973. In this Adjudication Order the Respondent revoked the Petitioner's license as a private investigator for the commission and conviction of the aforementioned felony

pursuant to his statutory authority and duty as contained in Section 4749.04 (B), Ohio Revised Code. Contrary to the implications contained in Petitioner's Statement of the Case the Respondent acted as he did for some very substantial and poignant reasons. *See* Respondent's Adjudication Order, *at* page eleven, Petition.

The Petitioner, pursuant to Section 119.12, Ohio Revised Code, appealed the Respondent's Adjudication Order to the Court of Common Pleas of Cuyahoga County, Ohio. On December 21, 1973, the Court of Common Pleas, although it found that the Adjudication Order was supported by the required quantum of evidence, modified the penalty contained in said Order by changing said penalty from revocation of Petitioner's license to a sixty (60) day suspension period.

Thereupon, the Respondent, feeling that this was contrary to Ohio law, timely appealed the judgment of the Court of Common Pleas to the Eighth District Court of Appeals for Cuyahoga County, Ohio. Said Court reversed the lower Court's judgment and reinstated the original Order of the Respondent.

Thereafter, the instant action has proceeded as set out in Petitioner's Statement of the Case.

BRIEF IN OPPOSITION

I. PETITIONER RECEIVED A FAIR AND IMPARTIAL HEARING IN ACCORDANCE WITH SECTION 119.09, OHIO REVISED CODE, WHICH COMPORTS WITH THE UNITED STATES CONSTITUTION AND WHICH GUARANTEED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

A. INTRODUCTION

At the outset let us review the most pertinent Ohio law involving the obligations of licensed private investigators and the authority and duties of the Respondent in relation thereto. Section 4749.04, Ohio Revised Code, is that law and it provides in pertinent part:

> The grounds for which the director of commerce may revoke, suspend or refuse to renew the license of any private investigator . . . include any of the following:
> . . . (B) Conviction of a felony or crime involving moral turpitude . . . .

Code Section 4749.04, *supra*, also establishes several other grounds for which a private investigator's license may be suspended or revoked, each of which appears to be less pernicious than a felony conviction.

As pointed out in the Statement of the Case, *supra*, an administrative hearing was held pursuant to Section 119.09, Ohio Revised Code, to determine Petitioner's suitability to remain licensed as a private investigator in the State of Ohio. The Petitioner was given ample and lawful notice of said right to the hearing and of the hearing date, time and place. He participated during said hearing and was represented by counsel. Likewise, and contrary to Petitioner's Statement of the Case, certain very substantial and damning evidence against the

Petitioner's suitability to remain licensed was presented during said hearing. It was stipulated by counsel for both Petitioner and Respondent that Petitioner had been indicted for and pleaded guilty to the aforementioned felony, to wit: attempting to make an illegal wiretap as well as attempting to procure another to commit the same offense. It was also stipulated during said hearing that Respondent had both the grounds and the authority to revoke Petitioner's license. Thus, the one and only *material fact* necessary to support the Respondent's Adjudication Order rendered herein was clearly proven, by stipulation, and without any dispute whatsoever. Likewise, and as the Respondent pointed out in his Adjudication Order, Petitioner not only committed a felony but he committed said felony in the course of conducting his business.

It was on this basis that Respondent revoked Petitioner's license. There is no question but that the Respondent's Adjudication Order was rendered in an authorized, lawful and procedurally proper manner, nor, is there any question but that the *material fact* supporting such Order is undisputed. Said Order has been reviewed by all three tiers of the Ohio court system and each has agreed in this respect, *i.e.*, proof by the required quantum of evidence.

B. SECTION 119.09, OHIO REVISED CODE, IS CONSTITUTIONAL, IN THAT IT PROVIDES A HEARING PROCESS WHICH COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first material issue before this Honorable Court is whether Section 119.09, Ohio Revised Code, generally comports with the Due Process Clause of the Fourteenth

Amendment to the United States Constitution. Certain of Petitioner's arguments in this respect are quite vague and unsupported by concrete instances or authority. Admittedly, the constitutional concept of due process of law is rather evasive. For this reason it would be helpful to refer to the words of Mr. Justice White, writing for the majority in a very recent case involving due process:

> 'Once it is determined that due process applies, the question remains what process is due?' *Morrissey v. Brewer, supra,* at 481. We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).
>
> *Goss v. Lopez,* No. 73-898 (U.S., decided Jan. 22, 1975), *at* 12.

In comparing the procedures employed in the instant action it is clear to see that Petitioner was afforded the fundamental fairness to which he is entitled and, perhaps, to a much greater degree than would actually be required.

Petitioner's first specific argument concerns the role of the Hearing Officer employed herein. First, he complains that he cannot receive a fair and impartial hearing from a Hearing Officer appointed pursuant to Section 119.09, Ohio Revised Code. Then, he complains because the Respondent did not adopt the Hearing Officer's recommendation as to the penalty to be imposed.

The role of the Hearing Officer appointed pursuant to Section 119.09, *supra,* is neither novel nor unconstitutional. For the purpose of analysis, one may compare the Ohio scheme to that contained in the Federal Administrative Procedures Act in that, although they are

not exactly alike, they are closely akin. *See*, 5 U.S.C. §§ 556 and 557.

Said Hearing Examiner is not the captive which Petitioner seems to imply. He must be an attorney and is required to conduct the hearing in accordance with the provisions of Section 119.09, Ohio Revised Code. Upon review, one can readily ascertain that said hearing must be conducted in a manner which comports with the requirements of Due Process of Law.

Subsequent to the administrative hearing described above, the Examiner prepares and submits to the agency involved a written report wherein he sets for his Findings of Fact. Conclusions of Law and a recommendation as to the action he believes should be taken by the agency. Then, according to Section 119.09, Ohio Revised Code, said recommendation of the Examiner may be approved, modified, or disapproved by the administrative agency involved. Thus, the employment and role of the Hearing Officer involved, does not, in any manner infringe upon Petitioner's right to Due Process of Law.

This brings us to Petitioner's other complaint, *i.e.*, that the Respondent did not adopt the Hearing Officer's recommendation *in toto*. Without saying more, one could argue that the Respondent could not be *required* to accept the Hearing Officer's recommendation as this would in all likelihood constitute an unlawful delegation within the Ohio statutory framework. *See generally*, K. Davis, Administrative Law Text, Section 9.01 (3rd ed., 1972). However, for the sake of comparison it is appropriate to examine the words of Professor Davis who, in discussing the role of the Hearing Officer pursuant to the Federal Administrative Procedures Act, states as follows:

> Of course, examiners are subordinates. The power is in the agencies, not in the examiners. Every deci-

> sion by an examiner . . . is subject to reversal by the agency. K. Davis, *supra*, Section 10.03.

In support of this, Professor Davis further states as follows:

> The key to the power of examiners to make decisions is a clear provision of Section 557 of the Administrative Procedures Act: . . . that the examiners may make an initial or recommended decision does *not withdraw any* power from the agency. Although the Administrative Procedures Act speaks of both 'initial' decisions and 'recommended' decisions by examiners, both are necessarily in the nature of recommendations, since 'the agency has all the powers which it would have in making the initial decision.' K. Davis, *supra*, Section 10.04.

Thus, the Hearing Examiner's role within the Ohio scheme is similar to that employed under the Federal scheme. His two major functions are to conduct hearings in a fair manner and thereafter, to make his report to the agency involved. Again, his role is that of recommending and not ultimately deciding. Thus, although Professor Davis' analysis was of the Federal Administrative Procedures Act, his thoughts are clearly applicable to the Ohio scheme. *See generally*, K. Davis, Administrative Law-Cases-Text-Problems, 192, 194 (1960); K. Davis, Administrative Law Text, Section 10.07, *supra*; Vol. 2, K. Davis, Administrative Law Treatise, Section 10.03 (1958).

C. THE RESPONDENT'S ADJUDICATION ORDER WAS NOT ARBITRARY NOR WAS IT THE PRODUCT OF PERSONAL BIAS OR CONFLICT OF INTEREST.

In reviewing the authorities which Petitioner cites at page six of his Petition it is apparent that they are

clearly distinguishable or that they actually support the actions taken by the Respondent herein.

First, it is clear that the Respondent did not unconstitutionally comingle the Prosecutor and Judge roles. The Respondent's agents prosecuted the case and the Respondent ultimately rendered the Adjudication Order at issue herein.

Secondly, the Respondent's Order is, without question, not arbitrary in that there is absolutely no dispute that Petitioner committed the felony for which his license was revoked pursuant to Section 4749.04, Ohio Revised Code.

Thirdly, the relationship between the Petitioner and Respondent herein are totally dissimilar to those described in the cases which Petitioner cites in support of his arguments pertaining to bias. *See, Narragansett Racing Association v. Kiernan*, 194 Atlantic 692 (1941); *National Labor Relations Board v. Donnelly Garment Company*, 67 S. Ct. 756 (1947). In the instant action there was no preexisting relationship between the parties such as was the situation in *Narragansett Racing Association v. Kiernan, supra*, where, prior to the hearing, the Appellant had called the Commissioner involved a "god damned liar", which was argued to have resulted in bias. Nor, is this a situation in which the Petitioner alleges an improper refusal to admit testimony as in *N.L.R.B. v. Donnelly Garment, supra.* Likewise, the Petitioner can not argue that the Respondent was biased because he had a pecuniary interest in the outcome of the proceedings. *See e.g., Gibson v. Berryhill,* 411 U.S. 564 (1973).

Finally, it is fair to argue that the Director was in no way personally biased against this Petitioner. The Respondent's action was *not* unlawful, unreasonable, arbi-

trary or capricious. He acted pursuant to his statutory duties and authority, *i.e.*, Section 4749.04, Ohio Revised Code, and carried out said actions in a procedurally lawful manner, *i.e.* pursuant to Chapter 119., Ohio Revised Code. An act which is in accordance with law can not, contrary to Petitioner's views, be deemed an abuse of discretion. The Respondent's very cogent and compelling reasons for revoking the Petitioner's license are clearly stated in Respondent's Adjudication Order. *See*, Adjudication Order, *at* Petition, pages 11 through 13.

II. THE PUNISHMENT INVOLVED IS NOT VOID IN THAT IT IS THE LAWFUL PRODUCT OF A VALID ADJUDICATION ORDER AND WAS RENDERED PURSUANT TO STATUTE — NOT A RULE.

Petitioner's second argument pertaining to "void punishment" is entirely without merit. Section 4749.04 (B) dictates that a private investigator's license may be revoked when said licensee has been convicted of committing a felony. The Petitioner, a licensee subject to that statute, was convicted of committing a felony and his license was revoked pursuant to the dictates of said statute. Said punishment is not the personal creation of the Respondent herein nor is it the product of rule — it is the product of an adjudication hearing and order and is clearly based upon a statute lawfully enacted by the State Legislature, to wit: Section 4749.04 (B), Ohio Revised Code.

III. THE PETITIONER HAS NOT BEEN TWICE PUNISHED FOR THE SAME OFFENSE.

This Honorable Court should reject out-of-hand all of Petitioner's arguments pertaining to double punishment. Said arguments can in no way be considered properly before this Court. This Court has never incorporated

Article I, Section 10, of the Ohio State Constitution into the Fourteenth Amendment to The United States Constitution. Petitioner alleges that it should be so incorporated but cites no authority in support thereof. Thus, it is not a proper question for review under either Rule 19 of the Supreme Court Rules or 28 U.S.C. § 1257 (3).

Assuming *arguendo*, that all of Petitioner's surface conclusions pertaining to both facts and law are proper, his reasoning remains faulty in that his most basic underlying premise is unsound. That is because the aforementioned citation to the Ohio Constitution according to Ohio law, encompasses only criminal offenses and not civil wrongs. *See, e.g., State v. Preston*, 20 O. App. 2d 333, 49 Ohio Op. 2d 456, 253 N.E. 2d 827, relating to an attempt to twice incarcerate the Appellant in the Ohio State Penitentiary for the same offense. Without question, the instant action was not in any sense a criminal proceeding nor was any criminal penalty imposed — the above proceedings were purely civil in nature.

Furthermore, Petitioner was not twice punished even in a civil law sense. His license was revoked *ab initio*. When the Petitioner's penalty was improperly modified by the lower Court, said improper modification was properly and timely appealed to the appropriate Ohio Court by the Respondent herein. The Respondent never attempted to enforce said improper penalty and any statements Petitioner makes to the contrary are totally irrelevant. The final, lawful and only order which the Respondent ever attempted to enforce was that which was originally imposed, *i.e.*, revocation.

Finally, if Respondent's argument herein needs further support, it should be pointed out that the purpose of the administrative hearing held herein was not to enforce the Criminal Code, but rather was a proceeding instituted to protect the public from unfit private investigators.

CONCLUSION

Respondent respectfully submits that a Writ of Certiorari should not issue in the instant proceeding. Petitioner has received a fair and impartial hearing, the elements of which fully comport with the Due Process guarantees contained in the Fourteenth Amendment to the United States Constitution. The ultimate Adjudication Order issued herein, was rendered in full compliance with all of Petitioner's procedural rights and the same was *not* the product of personal bias, as Petitioner alleges, nor was it the product of any conflict of interest.

Likewise, the punishment which Petitioner received was imposed pursuant to statute and not pursuant to any rule as Petitioner argues. Said punishment was imposed subsequent to an adjudication hearing in which all relevant and material facts were either proven or agreed to by stipulation.

Finally, it is beyond cavil that Petitioner was not, in either a constitutional or factual sense, twice punished for the same offense.

Based upon the foregoing, Respondent respectfully submits that this Honorable Court should refuse to grant a Writ of Certiorari in the instant action.

Respectfully submitted,
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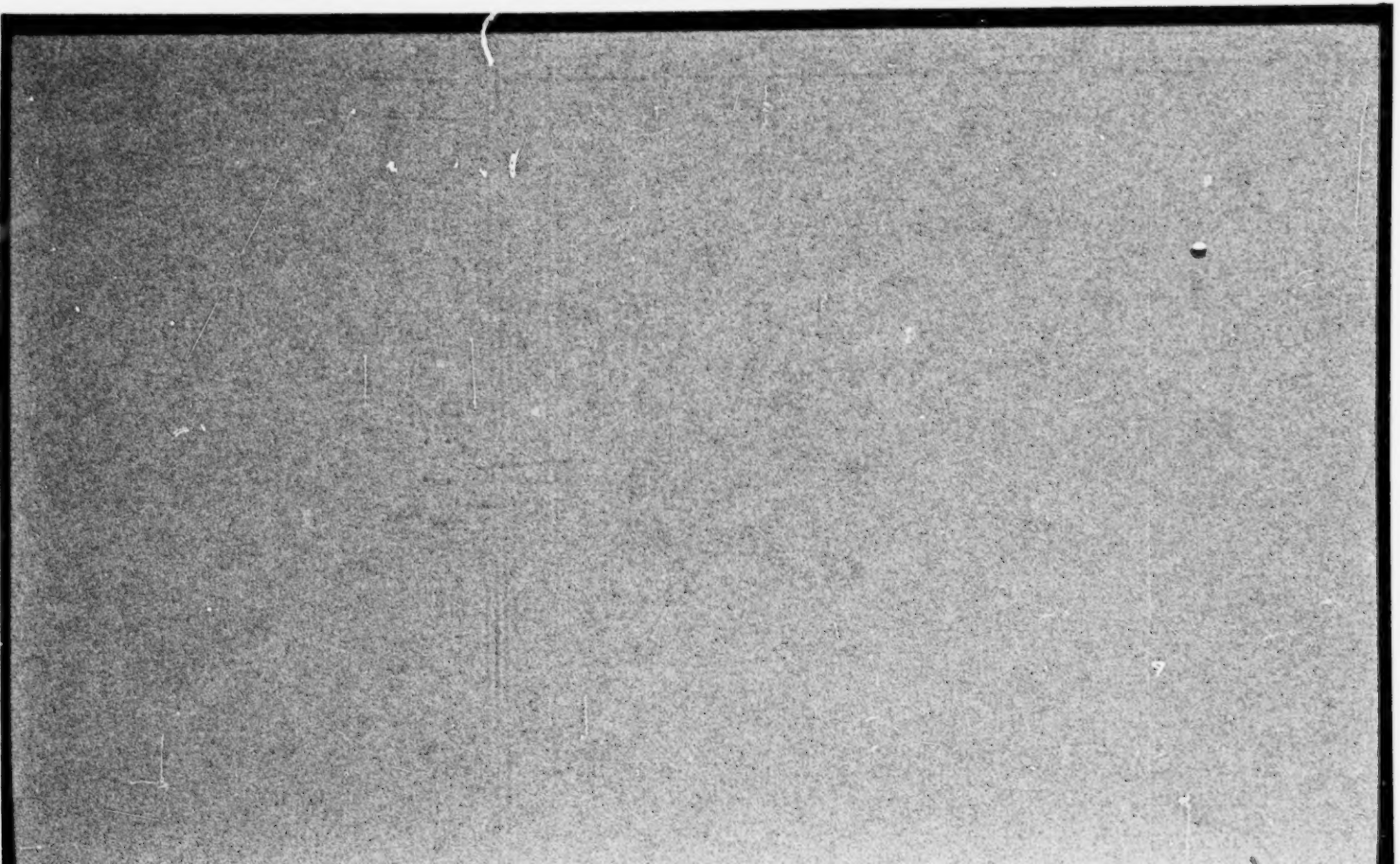

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT OF OHIO

REPLY BRIEF OF PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT OF OHIO

REPLY BRIEF OF PETITIONER

I. NO FAIR AND IMPARTIAL HEARING

What Was the Purpose of the Adversary Hearings

It was to determine whether or not the Petitioner had been convicted of a felony and to take and weigh evidence offered so that a fair and proper penalty could be imposed.

In the case of *Department of Liquor Control v. Santucci* (1969), 17 Ohio St. 2d 69, 70-71, 246 N.E.2d 549, the highest court in Ohio has held that in the *absence of evidence offered in mitigation of penalty* the stipulation by a licenseholder that he had been convicted of a felony is substantial, reliable and probative evidence to support an adjudication order. However, any evidence offered in mitigation of penalty would be for the consideration of the tribunal.

In the instant case extensive evidence was offered by Petitioner in mitigation of penalty. Both the hearing officer and the Common Pleas Judge on appeal were moved by said evidence.

What was legally due and denied Petitioner? A fair and unbiased hearing which was impossible under the procedure established by O.R.C. 119.09.

II. VOID PUNISHMENT

It is true that the statutory law of Ohio does set forth penalties, three in number, one of which, after a hearing and based upon evidence *may* be enforced against the felon licenseholder by the agency.

Respondent, Dennis Shaul, states that he has authority as a matter of law to enforce his preconceived arbitrary penalty against Petitioner at his discretion since Petitioner stipulated his conviction to a felony at the hearings. If this were true then what was the purpose of the evidence offered in mitigation of penalty at the hearings?

What was legally due and denied Petitioner? A fair penalty based upon the evidence which was impossible under the procedure established by O.R.C. 119.09.

III. DOUBLE PUNISHMENT

Clearly the State of Ohio in the instant case has ordered a double penalty against Petitioner. A double penalty for the same wrong in the same case is contrary to the very foundation of American Jurisprudence.

The first penalty admittedly was for the protection of the public. What was the purpose and nature of the second penalty? Is the second penalty revoking Petitioner's license for life a civil penalty, criminal penalty or just an illegal penalty? If it is a civil penalty then the civil rule of estoppel should apply. If it is a criminal penalty then the rule against double jeopardy should apply. If the penalty is just illegal then it should be null and void.

What was legally due and denied Petitioner? One penalty.

CONCLUSION

It is impossible under the procedure established by O.R.C. §119.09 for any person in Ohio to receive a fair and impartial administrative hearing. Said statute clearly commingles the function of the investigator, prosecutor, hearing officer, decision maker and punisher. The whole concept of American Jurisprudence is contrary to said procedure.

Petitioner has been denied by the State of Ohio "Due Process of Law," same being guaranteed to Petitioner by the Federal Constitution, Article XIV, Section I.

Petitioner respectfully moves that his petition for Writ of Certiorari be granted.

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